

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

—

EDWARD J. McBRIDE, doing business as Continental Press Service,

Petitioner,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Respondent.

—

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11969

United States
Circuit Court of Appeals
for the Ninth Circuit

EDWARD J. McBRIDE, doing business as Continental Press Service,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR,

675 Subway Terminal Bldg.,

417 S. Hill St.,

Los Angeles 13, Calif.

For Appellee:

LAWLER, FELIX & HALL,

Oscar Lawler,

800 Standard Oil Bldg.,

Los Angeles 15, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Southern District of California, Central
Division

No. 8158—O'C

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Defendant.

COMPLAINT

Comes now the Plaintiff and complains of the
Defendant, and for first cause of action alleges:

I.

Plaintiff is, and at all times hereinafter mentioned was, a citizen and a resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California, and a common carrier for hire, engaged in interstate and foreign communication by wire within the terms of the Federal Communications Act of 1934 as amended. [2]

III.

The jurisdiction of this Court is based upon the fact that Plaintiff is a citizen of the State of Ohio, and Defendant, The Western Union Telegraph Company, is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of New York, engaged in business within the County of Los Angeles, State of California; and the amount involved in this controversy exceeds \$3,000.00, exclusive of interest and costs [Title 28 U.S.C.A., Section 41(1)].

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the fictitious name and style of The Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct con-

nection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and has been supplied with, interstate Morse [3] wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service according to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and

without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities described herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company. [4]

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold.

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications

for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff cannot transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff. The refusal and [5] failure of The Western Union Telegraph Company to supply Plaintiff this service, has caused, and will cause, Plaintiff irreparable damage for which Plaintiff has no adequate remedy at law.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued

such interstate Morse wire service by Plaintiff to Consolidated Publishing Company.

For a Second and Separate Cause of Action, Plaintiff alleges:

I.

Plaintiff refers to Paragraph I of the first cause of action and makes the same a part hereof as if fully set forth herein.

II.

Plaintiff refers to Paragraph II of the first cause of action and makes the same a part hereof as if fully set forth herein.

III.

This action arises and the Court has jurisdiction under Section 406 of the Communications Act of 1934, as amended (48 Stat. 1095; U.S.C., Title 47, Section 406), to compel the Defendant, The Western Union Telegraph Company, a common carrier for hire, engaged in furnishing interstate and foreign communication by wire, to restore transmission service in interstate and foreign communication to Plaintiff upon the same terms and conditions as those given by said Defendant for like communication facilities to any other party or person. [6]

IV.

At all times herein mentioned, Plaintiff was, and now is, an individual doing business under the

fictitious name and style of the Continental Press Service with principal offices located in Cleveland, Ohio, and other offices located in Chicago, Illinois and New York, New York. Plaintiff is engaged in the business of disseminating information of sporting events, including racing news, over the interstate and foreign communication wires and facilities of Defendant to its customers located throughout the United States, and in Canada and Mexico. Such news of sporting events is transmitted to Plaintiff's customers in interstate commerce by use of a Morse wire furnished by Defendant which traverses the United States, extending to Florida, New York, Oregon, California and intermediate states, and reaching into Canada and Mexico. Each of Plaintiff's customers receives its sporting and racing news service by direct connection with the main interstate Morse wire, and each message is simultaneously transmitted from Plaintiff to all of its customers located in the various states throughout the United States, and in Canada and Mexico.

V.

Prior to April 2, 1948, Plaintiff applied to Defendant for, and had been supplied with, interstate Morse wire facilities to be used to supply Plaintiff's customers with news, including sporting and racing news. Such wire facilities included a direct connection from the main line to each customer. Plaintiff paid Defendant for such service, and is willing to continue to pay for such service accord-

ing to the established rates and billing practices of Defendant. Prior to April 2, 1948, Plaintiff was using the wire facilities supplied by Defendant to transmit its news to each of its customers connected with the interstate wire facilities, including Consolidated Publishing [7] Company of Los Angeles, California, and that company was receiving and paying Plaintiff Five Hundred Dollars per week for the news supplied by Plaintiff over the interstate Morse wire facilities of Defendant. Plaintiff has heretofore relied upon and still does rely upon the Defendant, The Western Union Telegraph Company, for interstate Morse wire facilities to supply its customers with news, including its customer, Consolidated Publishing Company of Los Angeles, California.

VI.

On April 2, 1948, Defendant wrongfully and without just cause discontinued Plaintiff's interstate Morse wire facilities by which Plaintiff was supplying news to its customers in the State of California, including its customer, Consolidated Publishing Company of Los Angeles, California. Plaintiff's customer, Consolidated Publishing Company of Los Angeles, California, still desires to purchase Plaintiff's news service over the interstate Morse wire facilities, and has so advised Plaintiff. Consolidated Publishing Company was paying Plaintiff Five Hundred Dollars per week for Plaintiff's news service, and the arbitrary discontinuance by Defendant of the facilities de-

scribed herein, prevents Plaintiff from continuing to sell its service to Consolidated Publishing Company.

VII.

The Consolidated Publishing Company is a partnership engaged in the business of disseminating general news and sporting news, principally racing news, by means of daily and weekly publications generally referred to as scratch sheets, which are sold to the public at news stands, in drug stores, and in other similar establishments throughout the Los Angeles area where newspapers and magazines are customarily sold. [8]

VIII.

Plaintiff has heretofore applied for, and has been supplied with, such interstate Morse wire facilities by Defendant with connections for each of Plaintiff's customers pursuant to said applications for service. The Morse wire facilities, with connections for each of Plaintiff's customers, have been in service and used by Plaintiff to transmit to said customers news, including sporting and racing news, up to and including April 2, 1948, when Defendant, without just cause, discontinued the interstate Morse wire facilities used by Plaintiff to transmit news to Consolidated Publishing Company.

IX.

Defendant is required by law to supply Plaintiff

with interstate Morse wire facilities of the type and kind hereinbefore referred to. Plaintiff can not transmit its news to the Consolidated Publishing Company over interstate Morse wire facilities unless Defendant is compelled or required by order of this Court to continue to supply Plaintiff with such facilities. Defendant has refused to provide such service to Plaintiff.

X.

The Defendant, The Western Union Telegraph Company, has been, and is, able and has the capacity of rendering the facilities herein prayed for and which were rendered Plaintiff prior to April 2, 1948, on which date Defendant arbitrarily and without proper cause, interrupted and discontinued such interstate Morse wire service by Plaintiff to Consolidated Publishing Company. [9]

Wherefore, Plaintiff prays in his first cause of action:

1. That Defendant, his agents, solicitors and employees, and each of them, be perpetually restrained and enjoined from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a preliminary injunction enjoining Defendant from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, until the entry of final judgment herein;

3. That this Court issue a temporary restraining order enjoining Defendant from refusing to furnish said service as hereinbefore described until a hearing may be had on the prayer for a preliminary injunction hereinabove prayed for, and Plaintiff prays that such order issue without notice to prevent further irreparable injury to Plaintiff's business as heretofore described;

Plaintiff prays respecting his second cause of action:

1. That this Court issue a permanent mandatory order compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California;

2. That this Court issue a temporary mandatory order without notice compelling Defendant to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, pending the hearing on the permanent mandatory order prayed for above; [10]

And Plaintiff further prays for his costs incurred herein; and for such other and further relief as this Court may deem just and proper.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.

(Verified.)

[Endorsed]: Filed April 22, 1948. [11]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Harold V. Belden, being first duly sworn, deposes and says:

That the Consolidated Publishing Company, hereinafter referred to as "Consolidated," is a partnership composed of Edward J. Maloney, Harold V. Belden and Russell Brophy, all residents of the County of Los Angeles, State of California, doing business under the fictitious name and style of Consolidated Publishing Company at 615 North La Brea Avenue, Los Angeles, California.

Consolidated is engaged in the business of disseminating sporting news, principally racing news, by means of daily and weekly publications which it prints in its own plant located at the above address. Consolidated prints and publishes the following [12] daily racing news sheets commonly referred to as "scratch sheets": Metropolitan Scratch Sheet, Reporter Scratch Sheet and Blue Sheet. A morning and an afternoon edition is printed each day except Sunday of the Metropolitan Scratch Sheet and Reporter Scratch Sheet. Its Blue Sheet is printed once daily except Sunday. Each week Consolidated sells approximately 100,000 daily scratch sheets. In addition, Consolidated publishes two weekly sporting papers, the Reporter Weekly and

the Hollywood Observer, which are issued on Friday and have a circulation of 2,800 copies per week.

Consolidated conducts its operations at the address above mentioned and at such place maintains both its offices and printing presses. The real estate is under lease and has an additional two years to run. The printing presses and other equipment owned by Consolidated and used to conduct its business are presently valued at approximately \$100,000.

Consolidated publishes and distributes its scratch sheets six days a week, fifty-two weeks each year, Sundays being excepted. It has approximately sixty-five employees and maintains the usual business offices where its books and records are kept for the purpose of reflecting its social-security program, unemployment insurance, withholding taxes, State and Federal income taxes, city license taxes and various other data necessary to the usual conduct of a business.

Other incidents of Consolidated's business are its union contracts which obligate the company to provide severance and accumulated vacation pay upon termination of employment.

Consolidated's daily and weekly sports publications are sold throughout the State of California, and also in the State of Nevada. The Metropolitan Scratch Sheet is admitted to second-class mailing privileges. The scratch sheets are distributed in Los Angeles by means of route men in a manner

similar to that employed by metropolitan newspapers. [13]

The method of distribution is substantially as follows: Each day a route carrier calls upon a newsstand operator and delivers the number of scratch sheets requested by the news dealer. The following day when the route man calls, he is paid for the sheets delivered the previous day, but allows credit to the newsstand operator for those remaining unsold. Consolidated has no proprietary interest in the newsstands and the relationship between it and the newsstands is solely that of seller and buyer.

In order to develop and increase its circulation, Consolidated offers an additional service in connection with the publication and distribution of its scratch sheets. It carries in each issue an advertisement in which telephone numbers are listed and the public is advised that calls may be made to Consolidated's offices for the purpose of obtaining racing results.

There is no substantial difference between the manner in which the business of Consolidated is conducted and that of the National Scratch Sheet which is published in Los Angeles by a competitor. Both are sold on the newsstands to the public and both permit telephone calls for the purpose of obtaining racing results.

Consolidated received daily news, including racing news, from the Continental Press over the interstate Morse wire facilities of Western Union. Consolidated pays for this news approximately

Five Hundred Dollars per week in accordance with its arrangement with Continental Press Service. This news is used in its daily and weekly publications. Prior to April 2, 1948, Consolidated had been receiving daily service from Continental Press Service over the Western Union interstate Morse wire facilities. On April 2, 1948, this news service was interrupted and discontinued and has not been since restored. Consolidated desires the restoration of this service and is ready, willing and able to continue to purchase news from the Continental Press Service.

Harold V. Belden, being duly sworn, deposes and says: [14]

That he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ HAROLD V. BELDEN.

Subscribed and sworn to before me this 21st day of April, 1948.

(Seal) /s/ F. A. E. BLOCK,

Notary Public in and for said County and State.

My Commission expires April 1, 1951.

[Endorsed]: Filed April 22, 1948. [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of Ohio,
County of Cuyahoga—ss.

Edward J. McBride, an individual doing business under the fictitious name and style of Continental Press Service, being first duly sworn, deposes and says that Continental Press Service, hereinafter referred to as “Continental Press,” is a sole proprietorship owned by deponent with its principal office located in Cleveland, Ohio, and two other offices located in Chicago, Illinois and New York, New York.

Continental Press is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of The Western Union Telegraph Company, hereinafter referred to as [16] “Western Union.”

Continental Press receives news of all types, principally sporting and racing news from throughout the North American continent, which it transmits over interstate Morse wire facilities of Western Union to its office in Chicago, Illinois. From its Chicago office, the news is sent over interstate Morse wires of Western Union to customers throughout the United States, Canada and Mexico, among which are newspapers, radio stations, and daily racing publications usually referred to as

scratch sheets. The news which the New York office receives from Chicago is relayed over separate interstate Morse wire facilities to eastern customers of Continental Press. When Continental Press has an application for service by a new customer or terminates a contract with an existing customer, it confers with Western Union and arranges for the extension or discontinuance of interstate Morse wire facilities to that particular customer. In each case where a customer is added, Western Union receives additional tariff for the use of the extended interstate wire facilities.

The main interstate Morse wire facilities of Continental Press at the presnt time cross every state in the Union and extend into Canada and Mexico.

Included among the subscribers of Continental Press who are served, directly or indirectly, in the various states, are Associated Press; United Press; Armstrong Publications; George Lawton, Publisher; Wahlmin Press Co., Inc., New York; Yonkers Daily Times, Yonkers, New York; Daily News and Trans-Radio Press, New York City; Illinois Sports News and Illinois News Association, Chicago, Illinois; Daily Sports News, Toronto, Canada; Daily Sports News, Detroit, Michigan; Texas Daily Sports News, Houston, Texas; Howard Sports Daily, Baltimore, Maryland; Harvey A. Jr., Miami, Florida; Daily [17] Sports News, Louisville, Kentucky; Times-Picayune, Daily Sports News, Daily State and Item Publishing Co., New Orleans, Louisiana; Columbus Journal and Columbus Dis-

patch, Columbus, Ohio; Old Pueblo Publishing Co., Tucson, Arizona; Sun Herald, Vancouver, Washington; and Victoria Times, Victoria, B. C. The following radio stations are also served: WTRY and WROW, Troy, New York; WINZ, Miami, Florida; WCAR and WLBK, Detroit, Michigan; WBNX, WFMO and WMCA, New York City; WLAP, Lexington, Kentucky; WITH, WCOM, WSID and WGIS, Baltimore, Maryland; WDAS, Philadelphia, Pennsylvania; and WRIP, Providence, Rhode Island.

General news and sporting news other than racing news, constitute from thirty to fifty per cent of the news furnished by Continental Press to its customers. Customers of Continental Press are free to distribute the news received from it in any manner or fashion they desire. Charges for such news service are based upon area, population, and other similar factors. Continental Press does not have any proprietorship or ownership interest in the business of its customers.

Consolidated Publishing Company of Los Angeles, California, is a customer of Continental Press and, prior to April 2, 1948, received by direct connection with the main interstate line of Continental Press, all types of news, including sporting and racing news, which Continental Press disseminated to its customers. For such service, Continental Press receives approximately Five Hundred Dollars from Consolidated Publishing Company. [18]

Edward J. McBride, being duly sworn, deposes and says that he has read the foregoing Affidavit and knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge and belief.

/s/ EDWARD J. McBRIDE.

Subscribed and sworn to before me this 14th day of April, 1948.

(Seal) /s/ JOSEPHINE LEBIT,

Notary Public in and for said County and State.

My Commission expires Mar. 26, 1949.

[Endorsed]: Filed April 22, 1948. [19]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

It appearing that the Plaintiff has filed a verified complaint in the above-entitled action demanding either a temporary mandatory order and final mandatory order, or preliminary and final injunction, and praying that a temporary restraining order be issued without notice; and it further appearing from the affidavits of Edward J. McBride and Harold V. Belden filed in support thereof that Defendant, on April 2, 1948, interrupted and discontinued the interstate Morse wire facilities between Plaintiff and its customer, Consolidated

Publishing Company of Los Angeles, California; that Defendant will continue to refuse to provide Plaintiff with interstate Morse wire facilities, which facilities are necessary for the transmission of its general news and sporting news to its customer, Consolidated Publishing Company of Los Angeles, California; that such refusal is contrary to the provisions of the Federal [20] Communications Act of 1934; that without such immediate service, Plaintiff cannot transmit its news to Consolidated Publishing Company; that such refusal to allow Plaintiff to serve this customer will result in irreparable damage and injury to Plaintiff by the permanent loss of the aforementioned Consolidated Publishing Company as a customer for its news; that such continued refusal will result in irreparable loss of Plaintiff's prestige and good will in the Los Angeles area, and it appearing that such irreparable injury and damage will occur before notice can be served and a hearing had on Plaintiff's application for a preliminary injunction or a temporary mandatory order; and good cause appearing,

Therefore, it is hereby ordered that the Defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the Defendants be, and they are hereby enjoined and restrained from refusing to furnish Plaintiff interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, of Los Angeles, California, and De-

fendant is ordered to restore such services from the date of the service of this Order to and including the further order of this Court;

It Is Further Ordered that the Defendant herein show cause, if any there be, before the above-en-
[In margin O'Connor Judge] April
titled Court on the 30th day of ~~May~~, 1948, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard in the courtroom of the Honorable J. F. T. O'Connor, Judge of the said Court in the United States Courts and Post Office Building, Temple and Spring Streets in the City of Los Angeles, County of Los Angeles, State of California, why a preliminary injunction should not issue, enjoining the Defendants from refusing to furnish interstate Morse wire service between Plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or a temporary mandatory order [21] pending the trial of the cause, should not issue ordering defendant to restore the above referred to services, except in accordance with the order of this Court.

It Is Further Ordered that this temporary order shall remain in full force and effect until the 30th day of April, 1948, or until further ordered by this Court.

Issued in the City of Los Angeles, County of Los Angeles, State of California, at Los Angeles on the 22nd day of April, 1948.

/s/ J. F. T. O'CONNOR,
Judge of the United States District Court.

[Endorsed]: Filed April 22, 1948. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF J. W. INWOOD RESPONSIVE TO ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

State of California,
Southern District of California,
County of Los Angeles—ss.

J. W. Inwood, being duly sworn, deposes and says: He is Superintendent of defendant The Western Union Telegraph Company at Los Angeles, California;

The Western Union Telegraph Company is now, and continuously since long prior to 1872 has been, a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general intrastate and interstate telegraph system and business throughout the United States and other countries;

Prior to the year 1872 the said corporation accepted the [23] provisions of the Act of Congress of July 24, 1866 (14 Stats. p. 221; 47 U.S.C.A. sec. 1) commonly known as the "Post Roads Act," and the provisions of section 536 of the Civil Code of the State of California, and throughout said time has been and still is maintaining and operating a general, intrastate and interstate telegraph system, with its lines along the highways and along and across the lands and waters of California and along the post roads throughout the United States;

At all times mentioned in the complaint defendant has been and still is maintaining and operating a public utility intrastate and interstate telegraph

system, under the control and regulation, as to its intrastate operations, of the Public Utilities Commission of the State of California, and, as to its interstate operations, of the Federal Communications Commission;

At all of the times mentioned in the complaint herein the Federal Communications Commission of the United States has, by its order in that behalf duly given and made, fixed and established defendant's "Tariff F.C.C. No. 219" governing the leasing and use of facilities such as those furnished by defendant to plaintiff and described in the complaint. Page 7 of said Tariff No. 219 has at all times mentioned in the complaint provided as follows:

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where [24] the Telegraph Company has facilities or can provide them at reasonable cost. All cases not meeting these requirements are subject to special consideration.

"Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the

equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in this paragraph do not apply to facilities furnished to another communication common carrier.)”

The fifth revised page 8 (and the predecessor pages 8) of said Tariff No. 219 has, at said times, provided and continues to provide as follows:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

The facilities and services furnished to plaintiff by defendant described in the complaint herein are known as “Leased [25] facilities” and also as “Private line service and circuits”;

Said private line service and circuits leased to plaintiff by defendant consist of a continuous telegraph wire or channel under the exclusive control of plaintiff for telegraph communication between designated terminals in different states of the United States, with intermediate stations or drops at specified points, including the points in California designated in the letter of the Attorney General of the State of California to defendant

dated March 31, 1948, hereinafter referred to. At each such terminal and at each such intermediate station or drop there is a Morse telegraph instrument. The telegraph operator and all other persons attending to each terminal and station or drop are employed by and are under the exclusive control of plaintiff. Defendant at no time has had any connection whatever with either or any of said employees. Each telegraph communication initiated at any of said terminals or drops is transmitted over said private line or circuit to each terminal and to every station or drop on said private line or circuit—in other words, said private line or circuit and each terminal and drop thereon has been at all times operated exclusively by plaintiff, and the service thereon and thereby is entirely under plaintiff's exclusive control; defendant merely maintains said private line and circuit in operating condition;

At all of the times mentioned in the complaint said Tariff No. 219, page 7, prescribed by the Federal Communications Commission and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained and still contain the following identical language governing the public utility private line services and circuits furnished to plaintiff by defendant:

“In view of the fact that the subscriber has [26] exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidsableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject

to the terms, conditions and limitation herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities."

No step has been taken by plaintiff or anyone else, to affiant's knowledge, to obtain any change or modification in said page 7 or revised page 8 of said "Tariff FCC 219" or for modification or change of said Tariff Sheets Nos. 1399T and 1400T of the California Public Utilities Commission or the order of the latter Commission, dated April 6, 1948, hereinafter referred to, or to have either said tariff provisions or said order declared unreasonable or otherwise objectionable;

All, each and every of the services and facilities provided by defendant to plaintiff described in the complaint herein were furnished by defendant pursuant to the Tariffs and Regulations prescribed and established by the duly constituted Regulatory authorities and applications made by plaintiff to defendant. Neither of said applications stated that the facilities applied for were "to be used to supply plaintiffs customers with news, including sporting and racing news" (see complaint, page 2, line 31, to line 2, page 3) or for any other specified purpose, and the facilities furnished by defendant to plaintiff were as hereinafter stated and not otherwise; [27]

Each and every of said applications was executed by or on behalf of plaintiff, was delivered to defendant and accepted by the latter at 60 Hudson Street, New York City, and declared as follows:

"The undersigned agrees that the facilities furnished under this tariff shall not be used for any

purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon or by the establishment of the service.”

On receipt of each such application and pursuant thereto, and in accordance with the lawfully established orders, regulations and tariffs prescribed by the regulatory authorities, defendant furnished the private line public utility facilities and services so applied for;

Defendant continued to maintain said leased private telegraph wire and drops in operating order for the private use of defendant until directed by the Attorney General and chief law enforcement officer of the State of California to discontinue the “drops” at the places specified in his letter of March 31, 1948, as hereinafter set forth;

Plaintiff has at all times had exclusive control of the communications over and by means of said facilities, and defendant has never policed, monitored or otherwise supervised or observed [23] the use of said facilities or any communications transmitted by means thereof, and has not been informed of any such communications or the use of said facilities otherwise than by the letter of March 31, 1948, from Attorney General Howser, and by the proceedings before the California Public Utilities

Commission referred to in said letter, and in the letter of March 4, 1948, from the District Attorney and the Sheriff of Kern County and the Chief of Police of Bakersfield, California, hereinafter referred to;

With reference to the discontinuance of service referred to in Paragraph VI of the complaint herein, affiant states that such discontinuance was not arbitrary, wrongful or without just cause, but that on the contrary, the facts with reference thereto are as follows:

At a time prior to February 18, 1948, the Public Utilities Commission of the State of California initiated that certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified of said proceedings and appeared at the hearings had in the course thereof;

Testimony was taken by said Commission in said proceeding on February 18, 19, 25, 26, and March 10, 1948, and decision and order thereon were made on April 6, 1948;

Throughout the pendency of said proceeding before said Public Utilities Commission, Honorable Fred N. Howser was and still is the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding; [29]

March 4, 1948, defendant received at its Bakersfield office, 1605 19th Street, Bakersfield, Califor-

nia, letter signed by Tom Scott, District Attorney of Kern County, California, J. E. Loustalot, Sheriff of Kern County, and H. V. Grayson, Chief of Police, Bakersfield, notifying defendant that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and requesting that defendant immediately discontinue said service and disconnect said telegraph instrument and wire at said address;

Following receipt of the letter just referred to, defendant discontinued the use of said wire and telegraph instrument at said 1911 Edison Highway, Bakersfield, California, on March 5, 1948, and service of said instrument and wire have not since been resumed;

On March 31, 1948, said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, signed and caused to be delivered to defendant a letter notifying defendant that defendant's facilities and services (being part of the private line service and circuits leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco
1911 Edison Highway, Bakersfield
181 Andreas Road, Palm Springs
Room 211, Platt Building, San Bernardino
362 D Street, San Bernardino
208 West Eighth Street, Los Angeles
615 North La Brea, Los Angeles
919 Fourth Avenue, San Diego. [30]

were being used to furnish information to book-makers in violation of section 337a of the Penal Code of California, and in said letter the Attorney General, "as chief law enforcement officer of this State," demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California. Copy of said letter of said Attorney General to defendant is hereto attached, made a part hereof, and marked "Exhibit A";

Pursuant to and because of the demand of the Attorney General and chief law enforcement officer of the State of California of March 31, 1948, and the demand of the District Attorney, and Sheriff of Kern County and the Chief of Police of Bakersfield of March 4, 1948, defendant discontinued and it continues to discontinue its facilities and service to plaintiff which are described in said letter of the Attorney General;

The facilities and services so discontinued are the part of plaintiff's facilities and services referred to in the complaint herein which are in the State of California;

Promptly upon receipt of the respective letters of March 4 and March 31, 1948, above referred to, defendant informed plaintiff of the receipt of said letters and of defendant's intention to comply therewith, and thereafter said facilities and services were discontinued;

On or about the 6th day of April, 1948, said Public Utilities Commission of the State of California, in said case No. 4930, entitled as aforesaid, duly made and promulgated the following order:

"The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready

for decision, the Commission being fully advised in the premises and basing its decision [31] upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

“It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

“It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with the law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

“It Is Further Ordered that each contract for communications service, by operation of law, shall

be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for [32] such service, and the provisions of said decision shall be deemed in law to be a part of any application for communications service, and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service. The term 'person', as used in this decision, shall include a subscriber to communications service, an applicant for such service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

"The term 'communications utility,' as used in this decision, includes a 'telephone corporation' and a 'telegraph corporation,' as those terms are defined in the Public Utilities Act. The secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein."

Copy of said order and decision was, prior to the filing of the complaint herein, transmitted by said Commission to and was received by defendant.

So far as known to affiant, no complaint has ever been made by plaintiff or by any one in plaintiff's behalf to the California Public Utilities Commission or to the Federal Communications Commission, or to any other officer or Commission, other than the complaint in this action, stating or claiming that plaintiff is or has been aggrieved by any Tariff, order or regulation of either of said Commissions herein referred to, or by said discontinu-

ance of said facilities and service, or any thereof, and said Tariffs and said order of the California Public Utilities Commission of April 6, 1948, are still in full force and effect. [33]

All of the acts and conduct of defendant referred to in the complaint and in this affidavit have been pursuant to, in reliance upon, and in conformity with the established Tariffs and orders prescribed by the Federal Communications Commission and the California Public Utilities Commission, and in reliance upon the representations and demands of State law enforcement officers as herein stated, and defendant has done no act or thing in violation of any law and has not refrained from doing or refused to do anything required by law, and has not in any manner prevented plaintiff from receiving intrastate or interstate telegraph service at the same charges, upon the same terms, and on conditions as favorable as like services by defendant are available under similar conditions to any other person.

/s/ J. W. INWOOD

Subscribed and sworn to before me this 4th day of May, 1948.

(Seal) /s/ JEAN F. CROWE,

Notary Public in and for said County and State.

My Commission expires May 28, 1949. [34]

EXHIBIT A

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL
600 State Building, Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses:

333 Montgomery Street, San Francisco

1911 Edison Highway, Bakersfield

181 Andreas Road, Palm Springs

(Investigation by this office indicates the true location to be at 179 Andreas Road)

Room 211, Platt Building, San Bernardino

362 D Street, San Bernardino

208 West Eighth Street, Los Angeles

615 North La Brea, Los Angeles

919 Fourth Avenue, San Diego [35]

The transcript of the above mentioned proceedings sets out a provision of the contract as given

by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,

Attorney General of California.

FNH*md

cc Warren Olney, III, Counsel
Commission on Organized Crime
1204 Balfour Building
San Francisco 4

Received copy of the within this 5th day of May,
1948.

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [36]

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, and for answer to the complaint, denies, avers and alleges, as follows:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Admits the allegations of Paragraph II of the complaint.

III.

Answering Paragraph III of the complaint, defendant alleges that it is now, and at all times since prior to the year 1872, it has been, a corporation organized and existing under the laws of the State of New York, for the purpose of maintaining and operating, and has been and is maintaining and operating a general public [37] utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California; and continuously since its organization defendant has accepted and exercised and continues to accept and exercise the right, privilege and franchise tendered by the Act of Congress of July 24, 1866 (14 Stats. p. 221), commonly known as the "Post Roads Act," to use the post roads throughout the United States for its public utility telegraph lines, and has accepted and exercised, and continues to accept and exercise, the right, privilege and franchise tendered by section 536 of the Civil Code of the State of California to construct, maintain and operate its telegraph lines

along and upon the public highways and along and across the lands and waters of the State of California.

IV.

Answering Paragraph IV of the complaint, defendant alleges that it has no knowledge or information sufficient to enable it to answer with regard thereto, and therefore and upon that ground denies that plaintiff is or at any time has been engaged in the business of disseminating information of sporting events or racing news either over the interstate and foreign communication wires and facilities of defendant or otherwise either to plaintiff's customers located throughout the United States or in Canada or in Mexico, or to any other persons or places;

Upon the same ground, defendant denies that news of sporting events is or has been transmitted to plaintiff's customers, either in interstate commerce or otherwise, by the use of a Morse wire or any wire furnished by defendant, to Florida, New York, Oregon, California or to intermediate states, or into Canada or Mexico, or to any other place or places;

Upon the same ground, denies that each or any of plaintiff's [38] customers receives or has received plaintiff's sporting or racing news service or any news service by direct or other connection with the main or other interstate or other Morse wire, or any wire belonging to or operated by defendant.

V.

Answering Paragraph V of the complaint, defendant alleges:

The leasing and operation of defendant's public utility facilities and service is now and at all times in the complaint mentioned, has been, as to interstate facilities and service, under the plenary control of the Federal Communications Commission, and, as to its intrastate operations and service in California, under the plenary control of the California Public Utilities Commission;

All of defendant's facilities and services which have been furnished to plaintiff as alleged in the complaint have been so furnished pursuant to, in accordance with, and as required by the Tariffs, schedules, rules, regulations and orders of the Federal Communications Commission, upon applications made by plaintiff as hereinafter stated;

At all of the times mentioned in the complaint Federal Communications Commission Tariff No. 219 has governed and controlled and continues to govern and control the operations, service and conduct of defendant in the leasing of its interstate, public utility communications facilities and services;

Throughout said time said Tariff No. 219 has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No. 219—Original Page 7.

LEASED FACILITIES

(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the private [39] use of customers, facilities for transmitting electrical signals between specified points. The furnishing of Leased Facility service is subject to the availability of facilities and equipment after considering the requirements of the Telegraph Company's telegraph message services. Further, the rates and regulations provided in this tariff contemplate the furnishing of service only to points and locations where the Telegraph Company has facilities or can provide them at reasonable costs. All cases not meeting these requirements are subject to special consideration.

Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. (Note: The restrictions set forth in

this paragraph do not apply to facilities furnished to another communication common carrier.)

Issued: February 24, 1941.

Effective: March 31, 1941'';

At all of the times mentioned in the complaint said F.C.C. Tariff No. 219 has also provided and required, and continues to provide and require that facilities and service leased by defendant

“shall not be used either directly or indirectly for the handling of communications for the public or any person, [40] firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives’’;

Said Tariff F.C.C. No. 219 has, throughout said time provided and required and continues to provide and require that:

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law’’;

On or about May 19, 1945, defendant received at its general offices, No. 60 Hudson Street, New York

City, New York, from Continental Press Service (said Continental Press Service being, as defendant is informed and believes, the name under which plaintiff was at the time doing, and continues to do business) application in writing that defendant lease to said Continental Press Service certain of defendant's public utility telegraph facilities and services, including a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with "drops" connected with said leased line at various points in the several states traversed by said line, including points in California;

Defendant alleges that said application did not state that the facilities and service applied for or any part thereof [41] were to be used for any particular purpose other than the transmission of telegraph communications generally, and did not state that the facilities or service were to be used to supply plaintiff's customers or any one else with sporting and racing news, but, on the contrary, defendant alleges the fact to be that said application contained no statement as to the nature of telegraphic communications which plaintiff or any one else intended to transmit by means of said facilities and service;

Plaintiff's said application to defendant of May 19, 1945, contained the following statement:

"The undersigned requests The Western Union

Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company's established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of [42] its officers hereon, or by the establishment of the service'';

On or about May 19, 1945, defendant accepted said application, and pursuant thereto and in accordance with the Tariffs, Regulations and Orders prescribed by the Federal Communications Commission, including said Tariff F.C.C. No. 219, defendant leased and furnished to plaintiff the telegraph facilities and service so applied for, for

the private use of said Continental Press Service; said facilities and service consisted of a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in states traversed by said wire, to Seattle, Washington, with connecting wire or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each "drop" therefrom, including "drops" at said points in California, hereinafter mentioned, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

On March 4, 1948, and for a long time prior thereto, and continuously thereafter until April 2, 1948, "drops," including a Morse telegraph instrument as a part thereof, were maintained as a part of said leased private wire at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211 Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
919 Fourth Avenue, San Diego; [43]

Each of said "drops" was so maintained and

operated as that any message initiated at any such drop could be and was immediately transmitted to all other drops in the various states traversed by said leased wire, including all of said drops connected with said leased wire in California;

The premises at the terminals of said leased wire and at each place where such "drops" were connected were not under any control of defendant, but were, as defendant is informed and believes, under the exclusive control of plaintiff or of plaintiff's affiliates or subsidiaries;

The telegraph operator, and all other attendants and employees, at each of said "drops" and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of plaintiff, and defendant had nothing to do either with the employment or services of any of such persons or of any one engaged in the transmission of messages or communications over or by means of said leased facilities and services, or with any such message or communication;

Under and pursuant to said Federal Communications Commission Tariff No. 219, all of the facilities and services so leased to plaintiff were required to be, and at all times were, for the exclusive private use of plaintiff and plaintiff's affiliates and subsidiaries, and the use and operation of said facilities and service and the transmission and receipt of communications by means thereof were at all times under plaintiff's exclusive control;

At no time did defendant or any one on defend-

ant's behalf have or exercise any control or supervision whatever over any use of said facilities and service so leased to plaintiff, or over any message or other communication transmitted by means thereof, nor did defendant at any time have any knowledge as to the purpose [44] of any such communication or message or the use made or intended to be made by plaintiff or anyone else of any such message or communication;

Defendant's sole contact with the facilities and service so leased to plaintiff was for the purpose of seeing that the same were kept in working order.

VI.

Defendant denies that on April 2, 1948, or at any other time or at all it wrongfully or arbitrarily or without just cause discontinued the interstate or any other facilities or service furnished by defendant to plaintiff, but, on the contrary, alleges that the facts in that respect were and are as follows, and not otherwise:

Prior to February 18, 1948, the California Public Utilities Commission, on its own motion, initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Said California Public Utilities Commission, in the course of said proceedings, heard testimony on February 18, 19, 25 and 26, and March 10, 1948, and rendered its decision and made its order therein on April 6, 1948. Copy of said decision and order is hereto attached, and is hereby referred to and made a part hereof to the same extent as if here set forth in full, and marked "Exhibit A";

Throughout said proceeding, Honorable Fred N. Howser was, and ever since January 1, 1947, has been and still is the Attorney [45] General and chief law enforcement officer of the State of California; as such Attorney General and chief law enforcement officer, he appeared and participated in said hearing before said Commission;

On March 4, 1948, defendant received letter signed by Tom Scott, then and now District Attorney of Kern County, California, J. E. Loustalot, then and now Sheriff of said Kern County, and H. V. Grayson, then and now Chief of Police of the City of Bakersfield, California, stating that defendant's telegraph instrument and wire (being part of the private line service and circuits leased by defendant to Continental Press Service, as aforesaid) located at 1911 Edison Highway, Bakersfield, Kern County, California, had been and were on March 4, 1948, being used to violate section 337a and section 182 of the Penal Code of California, and demanding that defendant immediately disconnect and discontinue said telegraph instrument and wire at said address. Copy of said

letter is hereto attached, marked "Exhibit B" and is here referred to and made a part hereof to the same extent as if here set forth in full;

On March 31, 1948, defendant received from said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of the State of California, letter stating that defendant's facilities and service (being part of the facilities and service so leased by defendant to plaintiff as aforesaid) at each of the addresses in said letter set forth, were being used in violation of the laws of the State of California, and demanding that defendant immediately discontinue the facilities and service to plaintiff in said letter described; copy of said letter is hereto attached, marked "Exhibit C," and is here referred to and made a part hereof to the same extent as if here set forth in full;

Immediately following receipt of said letters of March 4, 1948, and March 31, 1948, just referred to, defendant informed [46] plaintiff of such receipt and of its intention to comply with the demands made therein. On April 2, 1948, defendant, pursuant to and in reliance upon the statements and representations made in said letters, and in the belief that said representations and statements were true and that the facilities described in said letters were being used and service supplied by means thereof for the purpose of violating the laws of the State of California, discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters, and immediately informed plaintiff of such discontinuance;

On April 6, 1948, said Public Utilities Commission of the State of California rendered its decision and made its order in said Case No. 4930, as set forth in Exhibit A hereto attached;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant, and, as defendant is informed and believes, and, therefore states the fact to be, plaintiff was fully informed with reference thereto prior to the filing of the complaint in this action;

Pursuant to and in reliance upon said F.C.C. Tariff No. 219, and the above quoted stipulation by plaintiff in its application to defendant of May 19, 1945, and because of, pursuant to, and in reliance upon the truth of said letter from said District Attorney and Sheriff of Kern County, California, and the Mayor of Bakersfield of March 4, 1948, and because of, pursuant to and in reliance upon the truth of the letter from the Attorney General of California, of March 31, 1948, the part of defendant's said facilities and service so leased to plaintiff located at the points stated in said letters was disconnected and discontinued, and, because of, pursuant and in obedience to and in reliance upon the decision and order of said California Commission attached hereto and marked [47] Exhibit A, as aforesaid, defendant has continued to discontinue and disconnect said facilities and services.

VII.

Defendant has no knowledge, information or be-

lief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that Consolidated Publishing Company is a partnership or that said partnership is or at any time has been engaged in the business of disseminating either general, sporting or racing news either by means of daily or weekly publications referred to as "scratch sheets" or otherwise.

VIII.

Defendant further alleges that discontinuance by it of the facilities and service so leased to plaintiff as aforesaid was in reliance upon and in the belief that the statements and representations made to it in said letters from the Attorney General of California and from the District Attorney and the Sheriff of Kern County and the Chief of Police of the City of Bakersfield, California, were and are true, and in the belief, based on such reliance, that defendant's facilities and service so leased to plaintiff were being used and service was being supplied thereby for the purpose of instigating and encouraging the unlawful acts condemned by sections 337a and 182 of the Penal Code of California, and said discontinuance of service has been continued also in reliance upon the decision and order of the California Public Utilities Commission of April 6, 1948 (Exhibit A hereto attached) and upon Federal Communications Commission Tariff No. 219, page 8, hereinbefore quoted and referred to, and upon the stipulation in plaintiff's application of May 19, 1945, heretofore referred to.

IX.

Admits that plaintiff has applied to defendant for and [48] has been supplied by defendant with interstate Morse wire facilities, but alleges that such facilities and service were and are as hereinbefore described, and not otherwise, and that the furnishing thereof has been under, pursuant to, and in accordance with the Tariffs, rules, regulations and orders of the public regulatory bodies and the application of plaintiff, all as hereinbefore stated, and not otherwise, and defendant denies that it has disconnected or discontinued such facilities or service, or that it continues to disconnect or discontinue the same arbitrarily or without just cause, or otherwise than as hereinbefore stated.

X.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto, and therefore and on that ground denies that plaintiff cannot transmit its news to Consolidated Publishing Company or to any other company or person over interstate Morse wire facilities unless defendant is compelled or required by order of this court to continue to supply plaintiff with such facilities;

Denies that defendant has refused to provide such service or facilities to plaintiff, but, on the contrary, alleges the fact to be that it is now and at all times has been ready and willing to furnish facilities and service to plaintiff and to all other persons in accordance with the Tariffs, Rules and

Regulations of the Federal Communications Commission and of the California Public Utilities Commission, and in such manner as not, by means of such facilities and service, to violate any law of the United States or the State of California or of any other State.

XI.

Defendant denies that its failure to supply plaintiff with its facilities and service has caused or will cause plaintiff [49] irreparable or any damage;

Denies that plaintiff has no adequate remedy at law; on the contrary, alleges the fact to be that plaintiff has and at all times has had the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 heretofore quoted, under and pursuant to which said facilities and service were discontinued as aforesaid, if, as plaintiff alleges, said provisions or some one or more thereof are arbitrary or otherwise unreasonable, or if plaintiff is otherwise aggrieved thereby, and plaintiff has at all times had and still has the right and privilege of making like application to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said Tariff or said order is unreasonable or if plaintiff is aggrieved thereby;

That because of the plenary power and control of said Federal Communications Commission and the California Public Utilities Commission over

the conduct, operations and services of defendant, defendant had and has no option except to strictly conform to and abide by the Tariffs, regulations, rules and orders of said Commissions within their respective jurisdictional spheres, and it has so conformed.

XII.

Defendant alleges that it has not, in any manner or at all, prevented plaintiff or any other person from receiving any service from defendant, either in interstate or foreign communication or otherwise or at all by wire or otherwise, at the same charges, and upon terms or conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person. [50]

XIII.

Defendant alleges that there is and has been no application by the Attorney General of the United States or request by the Federal Communications Commission for the filing of this or any action, nor any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Title 47 of the United States Code, and that this action was commenced and is being maintained without any such application or request. [51]

ANSWER TO SECOND CAUSE OF ACTION

Answering the second and separate cause of action, defendant denies, avers and alleges as follows:

I.

Defendant hereby refers to and makes a part hereof, to the same extent as though set out in full herein, paragraphs I to XIII, inclusive, of the foregoing answer to plaintiff's first alleged cause of action.

II.

Defendant has no information or belief upon the subject sufficient to enable it to answer with regard thereto and therefore on that ground denies that plaintiff is, or at any time has been, engaged in the business of disseminating information of sporting events or racing news, either over interstate and foreign communications wires and facilities of defendant or otherwise; upon the same ground denies that any such news is transmitted to plaintiff's customers in interstate commerce by the use of a Morse code furnished by defendant; upon the same ground denies that plaintiff, or each or any of plaintiff's customers, receives or has received any sporting or racing news service by direct connection with main interstate Morse wire, or that each or any sporting or racing news message is transmitted to all or any of plaintiff's customers.

III.

Defendant alleges that its public utility telegraph facilities and service have been furnished to plaintiff as in this answer heretofore stated, and not otherwise; that said facilities and service were

furnished pursuant to application of plaintiff and in accordance with the Tariffs, rules and regulations of the Federal Communications Commission and the Tariffs, rules and regulations of the California Public Utilities Commission, as in this answer [52] heretofore stated, and that the discontinuance of said facilities and service was, and continuance of such discontinuance is as stated in this answer, and not otherwise, and that such discontinuance of service was and is as required and demanded by law enforcement officers of the State of California as hereinbefore stated, and pursuant to and in accordance with the Tariffs, rules, regulations and orders of said Federal and State Commissions and as authorized by plaintiff's express agreement set forth in plaintiff's application to defendant for such service, all as hereinbefore in this answer set forth, and not otherwise.

IV.

Defendant has been and is, by the order of said California Public Utilities Commission, dated April 6, 1948, forbidden to resume such facilities and service to plaintiff.

Wherefore defendant prays that it be hence dismissed and for its costs.

LAWLER, FELIX & HALL,
OSCAR LAWLER,
/s/ OSCAR LAWLER,

Attorneys for defendant, The Western Union
Telegraph Company. [53]

EXHIBIT "A"

Decision No. 41415

Before the Public Utilities Commission of the
State of California

Case No. 4930

Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest.

F. V. Rhodes and Marshall K. Taylor, for California Independent Telephone Association; Marshall K. Taylor, for Associated Telephone Company, Limited, San Joaquin Associated Telephone Company, and Consolidated Telephone Company; Pillsbury, Madison & Sutro, by John A. Sutro and Francis N. Marshall, for Pacific Telephone and Telegraph Company; Pillsbury, Madison & Sutro, by Hugh Fullerton and Henry G. Hayes, for Western Union Telegraph Company, respondents. Fred N. Howser, Attorney General, for the State of California, John H. Hanson, Chief Investigator of the Special Crime Study Commission on Organized Crime, for the State of California; Roger Arnebergh, for the City of Los Angeles; Warren Olney, for State Commission on Organized Crime; Everett

C. McKeage and Roderick B. Cassidy of the Commission's Staff, appearing for the Public Utilities Commission.

OPINION

Public hearings in this matter were held, before Commissioner Huls and Examiner Syphers, on February 18 and 19, 1948, at Los Angeles, February 25 and 26, 1948, at San Francisco, and March 10, 1948, at Sacramento. On these dates evidence was adduced and on the last-named date the matter was submitted.

These hearings were initiated on the Commission's own motion after the Commission had informally considered the subject matter of the instant investigation and after the receipt of a letter,¹ dated December 12, 1947, from the Special Crime Study Commission on Organized Crime, alleging that organized bookmaking [18] and the so-called "wire service" on which it depends are able to exist only because of their extensive use of the facilities of communications utilities.

The provisions of Section 337a of the Penal Code denounce bookmaking as a public offense.

At the hearing, testimony was introduced by the Attorney General of the State of California which included information showing the number of arrests for bookmaking,² by counties, in the State, the

¹ Exhibit No. 2.

² As used in this respect bookmaking refers to any arrangements for the taking of off-track bets on horse racing.

number of telephones seized by police officers, the number of convictions for bookmaking, and various other information.³ These exhibits clearly indicate that there has been a large amount of bookmaking conducted in the State of California, particularly in the more populous counties such as Alameda, San Diego, San Francisco, and Los Angeles. Testimony was received from the Sheriffs of Imperial, Los Angeles, and Alameda Counties, from the Chiefs of Police of the Cities of Long Beach, Los Angeles, Fresno, Merced, and Stockton, from the U. S. Attorney for the Southern District of California, and from the District Attorneys of Los Angeles, San Diego, Stanislaus, Alameda, and Sacramento Counties, all of which testimony indicated that bookmaking is a major law enforcement problem. This testimony further indicated [56] that bookmaking is a definite evil in that it promotes gangsterism, contributes to delinquency and non-support, and fosters, within the public itself, a disrespect for law enforcement. These officials were practically unanimous in stating that every effort should be made to stamp out bookmaking and they further stated that bookmakers were almost completely dependent upon the use of telephone and telegraph facilities. It was the conclusion of these

³ Exhibit No. 3 showed this information as related to cases handled by District Attorneys throughout the State; Exhibit No. 4 showed the same information as to cases handled by Sheriffs' Offices; and Exhibit No. 5 showed the same information as to cases handled by Police Departments.

law enforcement officials that one of the most effective methods of controlling bookmaking would be to curtail, or prohibit completely, if possible, the use, by bookmakers, of telephone and telegraph facilities.

Other testimony was presented at the hearing indicating, in some detail, the methods used by bookmakers in carrying on their business. It was developed that, while there is legalized pari mutuel betting at the race tracks in California, the operators and proprietors of these licensed tracks are not favorable to illegal bookmaking operations. They take the view that off-track bookmakers constitute "parasites" and are undesirable. Accordingly, it is the general practice at race tracks in California to prohibit any activities which would further illegal bookmaking. To this end all of the public telephones at the race tracks are locked approximately a half hour before the starting time of each race. In addition, any special activity which has for its purpose the gathering and disseminating of racing information, other than that gathered and disseminated by the regular newsgathering agencies, is prohibited. Only the authorized press services and newspapers have access to the track press boxes. The so-called specialized racing information services are barred. [57]

The testimony indicated that there has developed in the United States special racing news-gathering services. Among these are the Continental Press Service and the Pioneer News Service. According

to the testimony, the Continental Press Service consists of a wire service which is leased from the Western Union and which has outlets at various cities throughout the United States; specifically, this press service has the following drops in California:

Name of Subscriber	Address	Date Service Started
Tejon News	1911 Edison Highway Bakersfield	5-12-45
Consolidated Publishing Co.	615 N. La Brea Ave., Los Angeles	5-12-45
Los Angeles Journalist	208 W. 8th St. Los Angeles	5-12-45
George Zouganiles	181 Andreas Rd., Palm Springs	9- 3-46 .
Arrowhead News	362 D Street San Bernardino	8-12-46
Colton News	211 Platt St. San Bernardino	8-12-46
Southwest News	919 4th Avenue San Diego	11- 5-45
Krelling & Cohen	333 Montgomery St. San Francisco	5-12-45

This press service is a Morse wire and the drops consist of both sending and receiving telegraph sets.

The Pioneer News, having headquarters at 333 Montgomery Street, San Francisco, California, is a service consisting of a wire leased from Western Union, over which is operated teleprinter or ticker sets. These teleprinters are the same instruments as are used in reporting stock-market news and are

located at various drops in California; specifically, these locations are: [58]

Name	Address	Date Service Started	Date Temp. Discon.
Roy Simon	1910 Tuolumne St. Fresno	6-22-46	2-19-48
J. Bozeman	326 Virginia St. Vallejo	5-25-46	1-29-48
W. Musso	215 Georgia St. Vallejo	5-25-46	1-29-48
J. Farrell	216 Georgia St. Vallejo	5-25-46	1-23-48
Mint Smoke Shop	237 Georgia St. Vallejo	8-14-47	1-29-48
Del Kennedy	1160 Old Country Rd. Belmont	10- 8-45	2-19-48
M. Magee	1617 Old Country Rd. Belmont	7-19-47	2-19-48
C. Atkin	145 Montgomery St. San Francisco	10- 8-45	2-19-48
Pioneer News	127 Montgomery St. San Francisco	1-30-46	2-19-48
F. Masonie	145 Mason St. San Francisco	3- 4-46	2-19-48
101 Service Station	Bayshore Highway Bayshore	1-31-47	4-16-48
Andy's Service	2637 Bayshore Highway Bayshore	8-16-47	1-30-48
Geneva Club	3201 Geneva Ave. Bayshore	11-17-47	2-19-48

It will be noted from an analysis of the above table that most of the drops of the Pioneer News Service were temporarily disconnected after the commencement of these hearings on February 18, 1948.

While the technical equipment of these two wire services, the Continental Press and the Pioneer News, are different in that one uses telegraph keys and the other uses teleprinters, still, in other respects, the basic method of operation is similar. In-

formation as to this method of operation was produced at the hearing. Since the Continental Press and the Pioneer News are among those services which are barred from the race tracks, they use various unorthodox methods to obtain information. The most common of these [59] methods, according to the testimony, is to use "signalers" or "wigwaggers", individuals who attend the races at the track and, by a system of signals, relay information to confederates outside who, in turn, send the information to the wire services.

Exhibits Nos. 33 to 37, introduced in evidence, consist of photographs showing a phone installation and a telescope in a house within view of the Santa Anita Race Track. The equipment shown in the photographs was used by one Ed Coplansky who, apparently, employed a telescope to observe signals from wigwaggers within the track. The information so obtained was telephoned to a drop of one of the wire services. The phone used by Coplansky was one which illegally had been tapped into the phone line of the owner of a nearby house.

The apparent reason these specialized wire services go to such extremes to obtain information is that special information is needed by their clients in order to conduct successful bookmaking activities. According to the testimony the information sent out over the regular news services and published in the regular newspapers, and even the detailed description of the running of races given over the radio, do not supply sufficient details to

permit successful bookmaking. A bookmaker needs the following information: (1) direct race odds and fluctuations in these odds; (2) the post time; (3) the exact off time within a matter of seconds; (4) a brief description of the race; (5) results of the race; (6) prices paid. In addition, a bookmaker needs information as to last-minute jockey changes and track conditions. These details are only furnished by the special racing wire service agencies.

As previously indicated, this detailed information is obtained at the race track by one device or another, then it is phoned to one of the offices of the wire service. At this office the information is placed on the wire and is immediately relayed to all of the drops of that particular wire service. Testimony was presented showing the operation of these drops. As soon as racing information is received it is called over a loud-speaker system. In front of the loud speaker are various phones, with the receivers off the hook, and, apparently, at the other end of these phones, bookmakers are listening for the information. Thus, in a matter of seconds, it is possible to get the information from the track to the bookmakers.

Testimony was presented by various police officers and sheriff's office employees as to visits they had made to these various wire service drops. In each of these places, according to the testimony, there are multiple phone installations. Instances were reported of as many as 26 phones in one room and other testimony presented by the telephone

company showed the subscribers to these various phones. Photostatic copies of the telephone cards listing the names of these subscribers were received in evidence as Exhibits Nos. 38 to 79, inclusive, and 80 to 92, inclusive. A general examination of these cards discloses that, while there were several phones in one place, most of them were listed under various fictitious names, including such terms as secretarial services, process service, research companies, printing companies, welding works, and, also, the names of various individuals.

Apparently, multiple phone installations are a necessary part of the equipment used in disseminating racing information to [61] bookmakers. Testimony was presented indicating that, in some cases, these multiple phone installations result from unauthorized extensions of existing facilities, while in other cases they are made by the telephone companies.

Exhibits Nos. 16 to 27, inclusive, consist of photographs taken by a sergeant of the Los Angeles Police Department, showing the facilities at some of the wire service drops in Los Angeles. In each of these instances equipment consists of an instrument for receiving information over the telegraph wire and several phones for relaying this information to outside subscribers. These outside subscribers pay for this service at rates varying from \$4.00 per month to \$339.24 per month. There is set out

below the rates paid by the eight subscribers to the Continental Press Service previously listed:

Subscriber	Monthly Charge
Tejon News	\$144.40
Consolidated Publishing Company	63.00
Los Angeles Journalist	4.00
George Zouganiles	72.27
Arrowhead News	65.93
Colton News	4.00
Southwest News	197.67
Krelling & Cohen	339.24

Additional testimony was presented by police officers as to raids they had made on various locations within the State of California. At some of these locations, including drops on the previously mentioned wire services, it was found that book-making was being carried on.

Testimony was received from representatives of the Western Union, setting out the manner in which these wire services are furnished. Arrangements for the Morse wire used by Continental Press were made in Cleveland, Ohio, and the charges for that lease [62] are paid at Cleveland. The Pioneer News lease, which started October 8, 1945, was arranged for by Stanley Cohen, and, apparently, the main office of Pioneer News is 333 Montgomery Street, San Francisco, California.

Respondent utilities in this case, so far as they were present at the hearing, indicated that their companies had no desire to furnish service for illegal uses and, almost unanimously, they indicated willingness to remove or refuse service whenever a bona fide law enforcement agency instructed them to do so. However, they further contended that

they were not policemen and it was without the scope of their authority to attempt to specifically police their subscribers in an effort to determine whether or not the facilities were being used for illegal purposes.

Another problem concerns the question as to whether or not a utility may be held liable for damages in an action brought by a subscriber to or applicant for service in those cases where the utility has discontinued or refused to extend service to such subscriber or applicant and, in this connection, it is the position of the utilities that they should not be subjected to any rule which would force upon them such actions for damages. We are well aware of the position of the utilities in this matter. However, it is our view, in the light of the evidence adduced in this matter, that certain lawful steps can be taken by the utilities which will curtail the use of their facilities by bookmakers.

From the foregoing evidence, we find that bookmaking is being conducted throughout the State of California on a large scale and, in order to conduct successful bookmaking, the operators thereof must have information in excess of that which can be obtained through regular news and radio channels. Accordingly, there has grown up a specialized wire service which has for its principal purpose the dissemination of detailed racing information within a matter of minutes after the occurrence of the actual events. This information includes details of the track conditions, betting odds, jockey changes,

and other facts occurring immediately prior to the running of the race, a description of the running of the race and the results thereof. These wire services sell this information to bookmakers who, in turn, use it in conducting their business. We, also, find that successful bookmaking cannot be conducted without access to these wire services or without access to telephone facilities.

We further find that it is in the public interest to require communications utilities to refrain from furnishing or continuing to furnish any telephone or telegraph service that will be or is being used in furthering bookmaking or related illegal activities. The use of communications facilities in furtherance of bookmaking being illegal, it follows that such use is contrary and detrimental to the public interest. Additionally, the evidence shows that, as of January 31, 1948, there were held by the fifteen largest telephone companies operating in this State 241,248 applications for telephone service, that could not be filled because of lack of instruments, facilities and materials. This situation makes it imperative that all communications instrumentalities and facilities be employed in the public interest.

The right of a person to utility services, such as telephone and telegraph, is not an inherent right but is due solely to the fact that the State, in the exercise of its police power, has seen fit, under the provisions of the Public Utilities Act, [64] to require the utility to serve the public without undue

or unreasonable discrimination. It, therefore, must be concluded that the State, having the authority to compel a utility to render service, has the authority to impose conditions under which such service may be furnished or terminated. (See *Partnoy v. Southwestern Bell Telephone Co.*, Missouri Public Service Commission, June 13, 1947, 70 P.U.R. (N. S.) 134.) It is established by statute in this State that a telephone or telegraph company is not required to accept messages which will "instigate or encourage the perpetration of any unlawful act * * *." (Section 638, Penal Code.)

It is the positive duty of a communications utility to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities. Such utility exercises a valuable and extraordinary privilege and, in turn, incurs corresponding obligations to the public. Surely, one of its highest obligations is to exercise vigilance to see that its instrumentalities and facilities are not used in aiding and abetting the commission of crime. We are not so naive as to believe that the operators of wire services, as discussed in this decision, can conduct their business of disseminating racing information without general knowledge as to the activities of their customers. The evidence in this case shows that some of the users of these wire services are engaged in bookmaking. The evidence further discloses instances of multiple telephone installations, which installations are aiding the activities of bookmakers. Therefore, we believe that any such in-

stallations should be scrutinized very carefully by the utilities furnishing the services and that additional installations should not be made without careful inquiry as to the nature of their use. [65]

It is the conclusion of this Commission that communications instrumentalities and facilities should not be furnished to persons who will use them for bookmaking or related illegal purposes; nor should they be furnished where there is strong evidence to indicate that the use will be for such illegal purposes. Neither should the furnishing of such instrumentalities and facilities be continued where reasonable cause exists for believing that such facilities are being so used. There is a duty resting upon communications utilities to refuse installations or to discontinue service when these conditions exist. There is a further duty on the utility to make reasonable inquiry as to the use of facilities and, in particular, this is true where the facilities are being installed in unusual circumstances.

ORDER

The above entitled case having been instituted on the Commission's own motion, public hearings having been held therein, said case now being ready for decision, the Commission being fully advised in the premises and basing its decision upon the evidence of record in this case and upon the findings of fact contained in the foregoing opinion,

It Is Hereby Ordered that any communications utility operating under the jurisdiction of this Commission must refuse to establish service for

any applicant, and it must discontinue and disconnect service to a subscriber, whenever it has reasonable cause to believe that the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement, or is being or is to be used as an [66] instrumentality, directly or indirectly, to violate or to aid and abet the violation of the law. A written notice to such utility from any official charged with the enforcement of the law stating that such service is being used or will be used as an instrumentality to violate or to aid and abet the violation of the law is sufficient to constitute such reasonable cause.

It Is Further Ordered that any person aggrieved by any action taken or threatened to be taken pursuant to the provisions of this decision shall have the right to file a complaint with this Commission in accordance with law. This remedy shall be exclusive. Except as specifically provided herein, no action at law or in equity shall accrue against any communications utility because, or as a result of, any matter or thing done or threatened to be done pursuant to the provisions of this decision.

It Is Further Ordered that each contract for communications service, by operation of law, shall be deemed to contain the provisions of this decision, whether or not the same be actually included as a part of the application for such service, and the provisions of said decision shall be deemed in

law to be a part of any application for communications service and the applicant for such service shall be deemed to have consented to the provisions of said decision as a consideration for the furnishing of such service.

The term "person," as used in this decision, shall include a subscriber to communications service, an applicant for such [67] service, a corporation, a company, a co-partnership, an association, a political subdivision, a public officer, a governmental agency, and an individual.

The term "communications utility," as used in this decision, includes a "telephone corporation" and a "telegraph corporation," as those terms are defined in the Public Utilities Act.

The Secretary is hereby directed to serve, by registered mail, a certified copy of this decision upon each communications utility operating under the jurisdiction of this Commission and upon each appearance of record herein.

This decision shall become effective after the expiration of twenty days from and after the date hereof.

Dated at San Francisco, California, this 6th day of April, 1948.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
IRA H. ROWELL,
HAROLD P. HULS,
KENNETH POTTER,
Commissioners. [68]

EXHIBIT "B"

Tom Scott

District Attorney

COUNTY OF KERN
STATE OF CALIFORNIA

March 4, 1948.

Western Union Telegraph Company,
1605 19th Street,
Bakersfield, Calif.

Gentlemen:

This is to notify you that there is a Western Union Telegraph Company telegraph machine and wire leased by your company, or contracted for by your company, that race horse results are received over this wire by virtue of a telegraph key and the use of some code. That said service is furnished to or contracted by the Tejon Sport News or James Mellow, alias James Monroe, or others whose names are unknown to the undersigned. That said leased or contracted machine and wire of your company is located at 1911 Edison Highway, Kern County California at what is known as the Old Ice House.

You are notified that said telegraph machine and wire is used in the County of Kern to violate Section 337a of the Penal Code of the State of California defining bookmaking and also Section 182 defining conspiracy. This telegraph machine and wire is used to aid, assist, and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County and by James Mello alias James Monroe, or the person who contracted

for and uses said telegraph machine and wire at said address on Edison Highway. [70]

This is to notify you of the illegal use of said telegraph machine and wire and to request that you immediately discontinue the service and disconnect said telegraph machine and wire at said address.

TOM SCOTT,
District Attorney of
Kern County, Calif.

J. E. LOUSTALOT,
Sheriff of Kern County,
California.

H. V. GRAYSON,
Chief of Police of the
City of Bakersfield. [71]

EXHIBIT "C"

State of California
Department of Justice

OFFICE OF THE ATTORNEY GENERAL

600 State Building
Los Angeles 12

March 31, 1948

Western Union Telegraph Company
722 Market Street
San Francisco, California
Attention: General Manager

Gentlemen:

A survey of the transcript of the proceedings of

February 18, 19, 25 and 26, and of March 10, 1948, before the Public Utilities Commission of the State of California at its hearings pertaining to the illegal use of Western Union wire services and/or telephonic equipment, indicates that you had leased wires to the Continental Press Service, which were and are engaged in furnishing information to book-makers in violation of Section 337a of the Penal Code of the State of California, at the following addresses

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Spring.

(Investigation by this office indicates the true location to be at 179 Andreas Road.)

Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego. [73]

The transcript of the above mentioned proceedings sets out a provision of the contract as given by you, Western Union, to the Continental Press Service in California, and I quote:

“The undersigned (i.e., Continental Press Service) agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the

service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcement agencies that the service is being supplied contrary to law.”

Pursuant to this quoted portion of your contract, by virtue of the terms and conditions therein contained, you are hereby notified that I, as Attorney General of the State of California, being designated as Chief Law Enforcement Officer of this State by our Constitution, do hereby demand that you immediately discontinue the leasing of any and all equipment to the Continental Press Service in California.

Very truly yours,

/s/ FRED N. HOWSER,
Attorney General of
California.

FNH*md

cc Warren Olney, III, Counsel
Commission on Organized Crime
1204 Balfour Building
San Francisco 4. [74]

United States of America,
Southern District of California,
Central Division,
County of Los Angeles—ss.

J. W Inwood, being by me first duly sworn, deposes and says: that he is Superintendent of The

Western Union Telegraph Company, a corporation, at Los Angeles, the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; and that he makes this verification for and on behalf of said corporation.

/s/ J W. INWOOD.

Subscribed and sworn to before me this 4th day of May, 1948.

[Seal] JEAN F. CROWE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 28, 1949.

Received copy of the within this 5th day of May, 1948. ..

CHARLES H. CARR,
Attorney for Plaintiff.

[Endorsed]: Filed May 5, 1948. [75]

At a stated term, to wit: the February Term, A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Wednesday, the 5th day of May in the year of our Lord one thousand nine hundred and forty eight.

Present: The Honorable J. F. T. O'Connor,
District Judge.

[Title of Cause]

This cause coming before the Court at this time for hearing on order to show cause and temporary restraining order heretofore filed on April 22, 1948, and continued to this time for hearing; Chas. H. Carr and Bryant Burton, Esqs., appearing as counsel for the plaintiff, and Oscar Lawler, Esq., appearing as counsel for the defendant; and the said Chas. H. Carr, Esq., having argued in support of the order to show cause directed to the defendant to show cause why a preliminary injunction should not issue enjoining the defendant as therein requested, and the said Oscar Lawler having argued in opposition thereto, and the Court having made a statement, it is now by the Court ordered that the temporary restraining order heretofore issued be vacated and that the request for the preliminary injunction be denied, and that the temporary mandatory order requested by the plaintiff pending the trial of the cause be likewise denied with exception allowed to the plaintiff. [76]

In the District Court of the United States for
the Southern District of California, Central
Division

No. 8158-O'C

EDWARD J. McBRIDE, doing business as Con-
tinental Press Service,

Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COM-
PANY, a corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW UPON REFUSING TO ISSUE
INTERLOCUTORY INJUNCTION; ORDER
DENYING INJUNCTION AND RESTORA-
TION OF SERVICE; AND ORDER VACAT-
ING THE TEMPORARY RESTRAINING
ORDER AND ORDER DIRECTING RES-
TORATION OF SERVICE HERETOFORE
ISSUED

The court, on the 2nd day of April, 1948, made its order in the above entitled matter, enjoining and restraining The Western Union Telegraph Company, a corporation, defendant above named, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with it, from refusing to furnish plaintiff with interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company of Los Angeles, California, directing defendant to re-

store such services heretofore discontinued from the date of the service of said order until the further order of the court, and directing the defendant to show cause on the 30th day of April, 1948, at 10 o'clock a.m. why a [77] preliminary injunction should not issue enjoining said defendant from refusing to furnish interstate Morse wire service between plaintiff and its customer, Consolidated Publishing Company, Los Angeles, California, or why temporary mandatory order pending the trial of the cause should not issue directing defendant to restore such services except in accordance with the order of the court.

The court, by consent of the parties, continued the hearing upon said order to show cause from April 30, 1948, at 10 o'clock a.m., until May 5, 1948.

Defendant, responsive to said order to show cause, having filed herein and served upon the plaintiff its verified answer to the complaint and the affidavit of J. W. Inwood, the matter came on regularly to be heard on said May 5, 1948, at 10 o'clock a.m., upon the complaint and the affidavits of Edward J. McBride and Harold V. Belden, filed by plaintiff, and the answer and said affidavit of J. W. Inwood, filed on behalf of defendant, and the court now sets forth its findings of fact and conclusions of law, which constitute the grounds of its action as hereinafter stated, as follows:

I.

Plaintiff is and at all times in the complaint

mentioned was a citizen and resident of the State of Ohio.

II.

Defendant, The Western Union Telegraph Company, is and at all times since prior to the year 1872 has been a corporation organized and existing under the laws of the State of New York for the purpose of maintaining and operating a general public utility, intrastate and interstate telegraph system and business throughout the United States, including the State of California.

III.

Continuously since its organization defendant has maintained and operated and continues to maintain and operate an interstate [78] telegraph system and service throughout the United States, including the State of California, which system has also throughout said time maintained intrastate telegraph service throughout California.

IV.

The amount involved in this controversy exceeds Three Thousand Dollars, exclusive of interest and costs.

V.

Defendant, for lack of information and belief with reference thereto, denies the allegations of Paragraph IV of the complaint as to the nature of plaintiff's business; on the same ground denies the allegations of said paragraph with reference to the transmission of news of sporting events by the use

of a Morse wire furnished by defendant to plaintiff's customers in Florida, New York, Oregon or intermediate states, or into Canada or Mexico; and on the same ground denies the allegation of said paragraph that plaintiff's customers receive or have received sporting or racing news service or any news service by direct or other connection with the main or other interstate, or Morse wire, or any wire belonging to or operated by defendant.

VI.

The telegraph facilities and service furnished by defendant to plaintiff referred to in the complaint were and are known and described as "leased facilities," and have been so furnished as follows, and not otherwise:

(a) On March 31, 1941, and at all times thereafter, Federal Communications Commission Tariff No. 219 governed and controlled and continues to govern and control the operations, service and conduct of defendants in the leasing of its interstate public utility communications facilities and services; throughout said [79] time said Tariff No. 219 (so far as pertinent hereto) has provided and required, and continues to provide and require as follows:

"The Western Union Telegraph Company—Tariff F.C.C. No 219—Original Page 7.

LEASED FACILITIES

"(8) The service: Leased Facility service as covered in this tariff consists of furnishing for the

private use of customers, facilities for transmitting electrical signals between specified points. * * *

“Facilities furnished under this tariff may be employed only for the private use of those companies whose offices are connected to the circuits, their affiliated and subsidiary companies and their representatives and each such office shall transmit and receive its particular communications over the equipment installed therein. Further, such facilities shall not be used either directly or indirectly for the handling of communications for the public or any person, firm or corporation other than those whose offices are connected to the circuits or their affiliated and subsidiary companies and their representatives. * * *

“Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law”;

At all times since March 31, 1941, said Federal Communications [80] Commission Tariff No. 219 and Tariff Sheets Nos. 1399T and 1400T, prescribed by the California Public Utilities Commission, have contained, and still contain, the following identical language governing the public utility

facilities and services furnished to plaintiff by defendant herein referred to:

“In view of the fact that the subscriber has exclusive control of his communications over the facilities furnished him by the Telegraph Company, and of the other uses for which facilities may be furnished him by the Telegraph Company, and because of unavoidableness of errors incident to the services and to the use of such facilities of the Telegraph Company, the services and facilities furnished by the Telegraph Company are subject to the terms, conditions and limitations herein specified and to such particular terms, conditions and limitations as are set out in the schedules applicable to particular services and facilities”;

(b) On or about May 19, 1945, Continental Press Service (being the name under which plaintiff was at the time doing and continues to do business) applied in writing to defendant at defendant's general offices, No. 60 Hudson Street, New York City, New York, that defendant lease to said Continental Press Service telegraph facilities, consisting of a Morse operated private telegraph line from the City of Chicago, Illinois, to the City of Seattle, Washington, by way of Los Angeles and San Francisco, California, and Portland, Oregon, and intermediate cities, with Morse telegraph instruments (known as and called “drops”) connected with said private telegraph line at said terminals and at various points in the several states traversed by said line, including points in California. In said

application plaintiff agreed and stipulated as follows: [81]

“The undersigned requests The Western Union Telegraph Company to furnish, subject to and in accordance with its lawful rates and regulations, the service described (including such modifications therein as may be ordered from time to time), for the established minimum period and thereafter until terminated by written notice from the undersigned, unless earlier terminated by the Company pursuant to its regulations, and agrees to pay for such service according to the Company’s established billing practices. The undersigned agrees that the facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states where the equipment is located, and that the company may discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law. This application shall become binding on both parties when accepted by the Company, such acceptance to be evidenced by the signature of one of its officers hereon, or by the establishment of the service”;

Said application did not state that the facilities and service applied for or any part thereof were to be used for any particular purpose, nor did it state that the facilities or service so applied for

were to be used to supply plaintiff's customers or anyone else with sporting or racing news; on the contrary, said application contained no statement as to the nature or the use intended to be made of telegraphic communications which plaintiff or anyone else intended to transmit by means of said facilities and service; [82]

(c) Defendant accepted said application at its said New York office on or about said 19th day of May, 1945, and pursuant thereto and in accordance with the tariffs, schedules, rules, regulations and orders prescribed by the Federal Communications Commission, leased to plaintiff a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon, and intermediate cities in the several states traversed by said wire to Seattle, Washington, with connected wires or channels (commonly called "drops") extending from said private leased wire or channel at various points and places in the states traversed by said line, including the places in California hereinafter mentioned; at the respective terminals of said private wire or channel and at each such drop therefrom, including said drops in California, the facilities and service so leased to plaintiff included a Morse telegraph instrument;

(d) On March 4, 1948, and for a long time prior thereto and continuously thereafter until the discontinuances hereinafter mentioned, drops, including at each drop a Morse telegraph instrument as

a part thereof, were maintained as a part of said leased private telegraph line facilities at each of the following places in California:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego;

(e) Each of said drops was so maintained and operated [83] as that any message initiated thereat could be and was immediately transmitted to all other drops connected with said leased line in the various states traversed by said line, including all of said drops connected with said leased line in California;

(f) Neither the premises at the terminals of said leased line nor at any place where any such telegraph instrument or drop was connected with said leased wire were under any control of defendant; all attendants and employees, including the telegraph operator, at each such drop and at all other places on said leased wire, were at all times employed by, and were under the exclusive control of, plaintiff, and defendant had nothing to do either with the employment or the services of any of such attendants or employees or of anyone engaged in or concerned with the transmission of messages or communications over or by means of said leased

facilities or with any such message or communication;

The telegraph facilities and service leased to plaintiff were, as required by said F.C.C. Tariff 219, for the private use of plaintiff and plaintiff's affiliated subsidiary companies, and plaintiff has at all times had exclusive control of the operation and use of said leased facilities and of all communications and messages transmitted over and by means thereof;

Defendant has never policed, monitored or otherwise supervised or observed the use of said facilities or been acquainted with any communications transmitted by means thereof; defendant has not been informed of any such communication or its contents, or of the use made of said facilities otherwise than by the letters from law enforcement officers of Kern County, California, of March 4, 1948, and from the Attorney General of the State of California of March 31, 1948, and by the proceedings before and decision and [84] order of the California Public Utilities Commission referred to in said letter of the Attorney General, which letters, decision and order are made a part of defendant's answer herein and marked Exhibits A, B and C, and are here referred to for particulars;

Defendant's sole contact with said leased facilities during said lease was and has been for the purpose of keeping the same in working order.

VII.

Defendant did not, on April 2, 1948, or at any

other time or at all, wrongfully, or arbitrarily, or without just cause, discontinue the facilities or service leased by it to plaintiff; on the contrary, the facts as to such discontinuance are as follows, and not otherwise:

At a time prior to February 18, 1948, the California Public Utilities Commission initiated a certain proceeding before said Commission entitled, "Case No. 4930; Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest";

Defendant was notified by said Commission of said proceedings and appeared at the hearings had in the course thereof;

Throughout the pendency of said proceedings Honorable Fred N. Howser was, and still is, the Attorney General and chief law enforcement officer of the State of California, and as such appeared in said proceeding before said Commission;

Also appearing in and represented throughout said proceedings before said Commission were the Chief Investigator of the Special Crime Study Commission on Organized Crime for the State of California, [85] and the State Commission on Organized Crime:

Hearing was had and testimony taken before said Commission in said proceeding on February

18, 19, 25, 26 and March 10, 1948, and said Commission rendered its decision and made its order therein on April 6, 1948. **Said decision and order** are attached to and made a part of defendant's answer herein, marked Exhibit A, and are here referred to for particulars;

During the pendency of said proceeding before said California Utilities Commission, and on March 4, 1948, defendant received at its office at 1605 19th Street, Bakersfield, California, letter signed by Tom Scott, as District Attorney of Kern County, California, by J. E. Loustalot, as Sheriff of said County (said persons being law enforcement officers of Kern County, California), and by H. V. Grayson, as Chief of Police of the City of Bakersfield (said person being law enforcement officer of the City of Bakersfield, in said county) notifying defendant that the latter's telegraph instrument and wire located at 1911 Edison Highway, Bakersfield, Kern County, California (being part of the private telegraph line facilities leased by defendant to plaintiff doing business as Continental Press Service as aforesaid), had been and were on March 4, 1948, being used "to aid, assist and carry on the business of illegal bookmaking by several known illegal bookmakers in Kern County, and by James Mellow, alias James Monroe, or the person who used said telegraph machine or wire at said address on Edison Highway," and to violate sections 182 and 337a of the Penal Code of California;

On March 31, 1948, defendants received from

said Honorable Fred N. Howser, as Attorney General and chief law enforcement officer of California, letter notifying defendant that its facilities and services (being part of the private line telegraph facilities [86] leased by defendant to plaintiff) at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,
208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to furnish information to book-makers in violation of section 337a of the Penal Code of California. In said letter said Attorney General "as chief law enforcement officer of this state" demanded that defendant immediately discontinue the leasing of its facilities and service to plaintiff in California;

Copies of the respective letters from the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, and from said Attorney General to defendant are attached to and made a part of the answer herein and marked Exhibits B and C, respectively. They are here referred to for further particulars;

Immediately following receipt of said letters, defendant informed plaintiff of the receipt thereof and of its intention to comply with the demands therein made;

On April 2, 1948, pursuant to and because of the statements and representations made in said two letters last above referred to, defendant discontinued the facilities and service so leased by it to plaintiff at the places and points specified in said letters and immediately informed plaintiff of such discontinuance;

April 6, 1948, prior to the commencement of this action, said California Public Utilities Commission rendered its decision and made its order in said Case No. 4930, stating, among other things, that from the testimony produced at the hearings in said case it found that the defendant's facilities leased to plaintiff were being [87] used by the Consolidated Publishing Company and other persons for illegal purposes. Said decision and order are attached to and made a part of defendant's answer herein and marked Exhibit A, and are here referred to for further particulars;

Copy of said decision and order was caused by said Commission to be transmitted to and was received by defendant.

VIII.

Defendant is now and at all times has been ready and willing to furnish facilities and services to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission in such manner as not, by means of such facilities and service, to violate any law of the United States or of the State of California, or of any other state.

IX.

Defendant has not refused to provide interstate Morse wire or any other of its public utility facilities to plaintiff; on the contrary it is now and at all times has been ready and willing to furnish its public utility facilities and service to plaintiff and to all other persons in accordance with the tariffs, rules and regulations of the Federal Communications Commission and of the California Public Utilities Commission, in such manner, however, as not, by means of such facilities and services, to violate or to aid and abet the violation of any law of the United States or of the State of California, or of any other state.

X.

It is not true that the refusal and failure of defendant to supply plaintiff with interstate Morse wire or other public utility facilities has caused or will cause plaintiff irreparable damage. [88]

XI.

No application has been made by plaintiff to the Federal Communications Commission to change, modify or abolish the provisions of said Commission's Tariff No. 219, set forth in defendant's answer and in the affidavit of J. W. Inwood, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XII.

Plaintiff has not applied to the California Public Utilities Commission to change, modify or abolish Tariffs 1399T and 1400T, prescribed by said Com-

mission, or to change, modify or rescind the decision or order of said Commission of April 6, 1948, or for any relief against defendant by said Commission for or on account of any of the acts complained of in the complaint herein.

XIII.

It is not true that plaintiff has no adequate remedy at law; on the contrary, plaintiff has, and at all times has had, the right and privilege of applying to the Federal Communications Commission to change, modify or abolish the provisions of said Tariff No. 219 hereinabove referred to, under and pursuant to which defendant's facilities and service were discontinued as aforesaid, and to compel defendant to render and provide its public utility services to plaintiff in all respects as required by law;

Plaintiff has at all times had the right and privilege of applying to the California Public Utilities Commission to change, modify or abolish said Tariffs 1399T and 1400T and said order of April 6, 1948, if either said tariff or said order is unreasonable or if plaintiff is aggrieved thereby; and to compel defendant to render and provide its public utility intrastate services to plaintiff in all respects as required by law. [89]

XIV.

It is not true that defendant has in any manner or at all prevented plaintiff from receiving any service from defendant either in interstate or foreign communication or otherwise or at all by wire or otherwise at the same charges and upon the

terms and conditions as favorable as the charges, terms and conditions given by defendant for like communication under similar conditions to any other person.

XV.

There is and has been no application by the Attorney General of the United States or request to the Federal Communications Commission for the filing of this or any other action, nor is there any allegation by either said Attorney General or said Commission of failure by defendant to comply with, or that defendant has violated any of the provisions of Chapter 5, Subchapter IV, sections 401 and 406, Title 47, of the United States Code, and this action was commenced and is being maintained without any such application or request. [90]

Upon the foregoing findings of fact, the court states its conclusions of law as follows:

1. The telegraph system of The Western Union Telegraph Company, a telegraph corporation, is, and at all the times mentioned in the complaint has been subject to the plenary control and regulation of the Federal Communications Commission as to its interstate operations, business and service, and subject to like plenary control and regulation of the California Public Utilities Commission as to its intrastate operations, business and service in the State of California;

2. At all of the times mentioned in the complaint, Federal Communications Commission Tariff No. 219 has reserved and continues to reserve to defendant the right to discontinue its service to any

drop or connection or to all drops and connections whenever defendant receives notice from federal or state law enforcing agencies that such service is being supplied contrary to law;

3. At all of the times mentioned in the complaint it was agreed by plaintiff that the facilities leased to him by defendant would not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of the State of California, and that defendant is at liberty to discontinue the service to any drop or connection or to all drops and connections so leased, on receipt by defendant from federal or state law enforcing agencies of notice that the facilities so leased are being used contrary to law. Said agreement is still in force and effect;

4. On March 4 and March 31, 1948, and on April 6, 1948, defendant received notices from the law enforcing agencies of the State of California, to-wit, the District Attorney and Sheriff of Kern County and the Chief of Police of Bakersfield, California, the [91] Attorney General and the Public Utilities Commission of said State, that the "drops" or connections and services included in defendant's lease to plaintiff at the following addresses:

333 Montgomery Street, San Francisco,
1911 Edison Highway, Bakersfield,
181 Andreas Road, Palm Springs,
Room 211, Platt Building, San Bernardino,
362 D Street, San Bernardino,

208 West Eighth Street, Los Angeles,
615 North La Brea, Los Angeles,
919 Fourth Avenue, San Diego,

were being used to violate and to aid and abet in the violation of the laws of the State of California;

5. Discontinuance by defendant of its facilities and services complained of herein was by reason of said notices from said law enforcing agencies and pursuant to and in accordance with the provisions of Federal Communications Commission Tariff No. 219, and the agreement between plaintiff and defendant, and was lawful;

6. Plaintiff has not applied to either the Federal Communications Commission or to the California Public Utilities Commission for any action or relief by either of said Commissions against defendant for or on account of any of the matters alleged in the complaint herein;

7. No application of the Attorney General of the United States, either at the request of the Federal Communications Commission or otherwise has been made herein to this court or otherwise or at all, alleging any failure of defendant to comply with any provision of Chapter 5, Title 47 of the United States Code;

8. This action was not commenced nor is it being maintained upon the relation of any person alleging any violation by [92] defendant of any

provision of said Chapter 5, Title 47 of the United States Code which prevents any such relator from receiving defendant's service in interstate or foreign communication by wire at the same charges or upon terms and conditions as favorable as those given by defendant for like communication or transmission under similar conditions to any other person;

9. Plaintiff is not entitled to preliminary injunction herein;

10. Plaintiff is not entitled to mandatory or any order that said leased facilities and service be restored;

11. Plaintiff is not entitled to have the temporary restraining order heretofore issued continued in force;

12. Plaintiff is not entitled to maintain this action. [93]

It Is, Therefore, Ordered:

That the temporary restraining order and the order directing restoration of service heretofore issued be and the same are hereby vacated and set aside;

That the request for preliminary injunction be and the same is hereby denied;

That the request for temporary or other mandatory order directing restoration of defendant's fa-

cilities and service pending the further order of the court be and the same is hereby denied.

Exception is allowed to plaintiff.

May 24, 1948.

/s/ J. E. F. O'CONNOR,
District Judge.

Dated: May 21st, 1948. 2:40 p.m.

The foregoing findings, conclusions of law, and order are approved as to form.

/s/ CHARLES H. CARR,
Attorney for Plaintiff.
By F. A. E. BLOCK.

Judgment entered May 24, 1948. Docketed May 24, 1948. J Book 50, Page 766.

EDMUND L. SMITH,
Clerk.

By /s/ J. MASON,
Deputy.

[Endorsed]: Filed June 3, 1948. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Edward J. McBride, doing business as Continental Press Service, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying the request for a preliminary in-

junction and for a mandatory order directing restoration of defendant's interstate Morse wire service between plaintiff and the Consolidated Publishing Company of Los Angeles, California.

Entered in this action on the 24th day of May, 1948.

/s/ CHARLES H. CARR,
Attorney for Appellant.

[Endorsed]: Filed June 3, 1948. [95]

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

1. Complaint.
2. Affidavit of Edward J. McBride in support of Complaint.
3. Affidavit of Harold V. Belden in support of Complaint.
4. Answer.
5. Order to Show Cause and Temporary Restraining Order of April 22, 1948. (Do not print Points and Authorities in support of Order to Show Cause.)

6. Affidavit of J. W. Inwood responsive to Order to [96] Show Cause and Temporary Restraining Order.

7. Minute Order of May 5, 1948—denying Preliminary Injunction and Mandatory Relief.

8. Findings of Fact and Conclusions of Law, Order denying Interlocutory Injunction and vacating Temporary Restraining Order and the Order Directing Restoration of Services—May 24, 1948.

9. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit.

10. Statement of Points on which Appellant Intends to Rely on Appeal.

11. Designation of Parts of the Record necessary for Consideration of Points on which Appellant Intends to Rely on the Appeal.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 15, 1948. [97]

In the District Court of the United States,
Southern District of California,
Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98, inclusive, contain

full, true and correct copies of Complaint; Affidavits of Harold V. Belden and Edward J. McBride; Order to Show Cause and Temporary Restraining Order; Affidavit of J. W. Inwood; Answer; Minute Order Entered May 5, 1948; Findings of Fact and Conclusions of Law upon Refusing to Issue Interlocutory Injunction; Order Denying Injunction and Restoration of Service and Order Vacating the Temporary Restraining Order and Order Directing Restoration of Service heretofore issued; Notice of Appeal and Designation of Record on Appeal which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$25.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of July, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

By /s/ Theodore Hocke,
Chief Deputy.

[Endorsed]: No. 11969. United States Circuit Court of Appeals for the Ninth Circuit. Edward J. McBride, doing business as Continental Press Service, Appellant, vs. The Western Union Telegraph Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 8, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11969

EDWARD J. McBRIDE, doing business
as CONTINENTAL PRESS SERVICE,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Appellant, Edward J. McBride, doing business
as Continental Press Service, herewith sets forth

a concise statement of the points on which he intends to rely on this appeal, viz.:

I.

The District Court erred in denying plaintiff's request for a preliminary injunction.

II.

The District Court erred in denying plaintiff mandatory relief prayed for in the Complaint.

III.

The findings of fact made by the District Court are inconsistent with and are not supported by the pleadings and record in the case.

IV.

The District Court erred in holding that plaintiff was not entitled to maintain this action.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD
NECESSARY FOR CONSIDERATION OF
POINTS ON WHICH APPELLANT IN-
TENDS TO RELY ON THE APPEAL

Appellant, Edward J. McBride, doing business as Continental Press Service, herewith designates the parts of the record which he thinks necessary for the consideration of the points on which he intends to rely on this appeal, namely:

I.

The entire transcript as certified to you by the Clerk of the District Court.

II.

Statement of points on which appellant intends to rely on appeal filed with the Clerk of this Court.

III.

Designation of parts of the record necessary for consideration of points on which appellant intends to rely on the appeal filed with the Clerk of this Court.

/s/ CHARLES H. CARR,
Attorney for Appellant.

(Affidavit of Service by Mail, attached.)

[Endorsed]: Filed July 14, 1948. Paul P. O'Brien, Clerk.